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THE CASE FOR OVERSEAS ARTICLE III COURTS: THE BLACKWATER EFFECT AND CRIMINAL ACCOUNTABILITY IN THE AGE OF PRIVATIZATION

Alan F. Williams*

INTRODUCTION

A series of high-profile cases involving the alleged murders of Iraqi civilians by U.S. contractors operating overseas has highlighted the longstanding problem of how best to address crimes committed overseas by civilian employees, dependents, or contractors of the U.S. government. Among the most notorious of these incidents is the alleged killing of seventeen Iraqi civilians in Nisour Square in Baghdad on September 16, 2007 by employees of Blackwater Worldwide,¹ a private corporation specializing in military operations that has subsequently renamed itself “Xe.”² News reports of this incident prompted embarrassment and outrage as many Americans learned that U.S. civilian contractors like the Blackwater/Xe employees serving overseas had been operating with impunity during the U.S. invasion and occupation of Iraq.³ Although a federal judge recently dismissed the cases of the five former Blackwater employees charged in the Nisour Square incident because of the prosecution’s misuse of compelled statements, unresolved questions linger about whether the assertion of criminal jurisdiction over them was proper in the first place.⁴

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1. See David Johnston & John M. Broder, *FBI Says Guards Killed 14 Iraqis Without Cause: Report on Blackwater*, N.Y. TIMES, Nov. 14, 2007, at A1.

2. See *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 14, 2009, at A10.

3. These individuals were immune to any Iraqi criminal proceeding by virtue of Coalition Provisional Authority (CPA) Order 17 issued on June 27, 2004 by CPA administrator Paul Bremer, the executive authority in Iraq at the time. See Coalition Provisional Auth. Order No. 17 (Revised): Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq § 2, ¶ 3 (June 27, 2004), available at <http://www.unhcr.org/refworld/docid/49997ada3.html>. Order 17 granted “sending nations” exclusive criminal jurisdiction over deployed service members and civilian contractors serving in Iraq. *Id.*

4. See Del Quentin Wilber, *Charges Dismissed Against Blackwater Guards in Iraqi Deaths*, WASH. POST, Jan. 1, 2010, at A1.

This unfortunate chapter in the U.S. occupation of Iraq refocused attention on the “jurisdictional gap” that has allowed many civilian employees and contractors of the U.S. government, particularly American citizens, to escape liability for crimes committed overseas. This “jurisdictional gap” is a recurring situation where civilians serving the U.S. government commit crimes outside the criminal jurisdiction of the United States, but are not subject to effective criminal accountability by another sovereign.

For more than a century civilian employees and contractors of the U.S. government working overseas routinely faced criminal charges before two unique and little-known institutions: U.S. military courts-martial and consular courts. However, within a span of less than ten years in the mid-twentieth century, these two institutions became unavailable as fora for handling overseas criminal cases—thus creating the jurisdictional gap. The jurisdictional gap described in this Article began to develop in the late 1950s when a series of U.S. Supreme Court cases severely restricted the ability of U.S. military courts-martial to try civilians.⁵ During the same period the U.S. consular courts system that had been in existence for more than a hundred years breathed its last gasp when Congress repealed the statute authorizing consular courts in 1956.⁶ Any remaining possibility of using military courts-martial as a forum for holding civilians accountable was firmly interred when the highest military appellate court declared that civilians could only be subjected to military courts-martial during a time of *declared war*.⁷

The loss of these two institutions for handling criminal cases ended effective criminal accountability for thousands of crimes, leaving those who committed crimes overseas subject only to the criminal jurisdiction of host nations that rarely pursued charges

5. Grisham v. Hagan, 361 U.S. 278, 280 (1960) (holding civilian employees committing capital offenses not amenable to military jurisdiction); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 248 (1960) (prohibiting military jurisdiction over civilian dependents in time of peace, regardless of whether the offense was capital or noncapital); Reid v. Covert, 354 U.S. 1 (1957) (holding civilian dependents accompanying the armed forces overseas in time of peace not triable by court-martial for capital offenses); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15 (1955) (disapproving the trial by courts-martial of persons not members of the armed forces).

6. See Act of Aug. 1, 1956, ch. 807, 70 Stat. 773 (repealing 22 U.S.C. §§ 141–143 (1952) (granting power to consular courts)).

7. See United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970). In *Averette*, the Court of Military Appeals rejected an interpretation of the phrase “time of war” that would have included times of armed conflict that had not been sanctioned through a formal declaration of war by Congress. *Id.* The court reasoned that the “most recent guidance in this area from the Supreme Court” dictated that “a strict and literal construction of the phrase” should be adopted. *Id.* The court was inclined to believe that any attempt to expand jurisdiction to the broader spectrum of armed conflict would impermissibly expand the very limited circumstances under which civilians could be tried by military courts. *Id.*

against Americans, especially when the victim of the crime was another American.⁸ This loss of the capability to maintain criminal accountability became quite significant as the post-World War II era was characterized by a dramatic rise in the number of civilians associated with the U.S. government stationed overseas. By 1999 there were almost 300,000 Department of Defense (DoD) civilian employees and dependents living abroad.⁹ At the height of U.S. involvement in Iraq and Afghanistan, at least 197,718 U.S. government contractors, and possibly thousands more, were working in these countries with nearly 40,000 of this number having American citizenship.¹⁰ Thus, we can conservatively estimate that nearly 500,000 civilian employees, dependents, and contractors of the U.S. government currently enjoy de facto immunity from meaningful criminal accountability as a result of these developments. Of this number, approximately 340,000 are Americans; the remainder are third country nationals employed by the U.S. government. As might be expected, since crimes committed by these personnel occurred overseas with no coverage by American news media, an “out-of-sight, out-of-mind” attitude seemed to prevail in Congress. Moreover, the public remained blissfully unaware of the problem despite the repeated entreaties of the commanders of overseas military bases who were primarily responsible for dealing with a significant amount of crime committed by these relatively large numbers of civilians.¹¹

After decades of neglecting the jurisdictional gap, Congress finally acted in 2000 by passing the poorly-named Military Extraterritorial Jurisdiction Act (MEJA).¹² In general, MEJA extended U.S. criminal jurisdiction for felony-level offenses to DoD contractors and employees of DoD contractors as well as some members of the armed forces.¹³ Within a few years it became apparent that civilians from many other agencies were also serving overseas but fell outside the language of the statute. The Act was

8. See *Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 8 (2000) [hereinafter *Hearing*] (statement of Sen. Steve Chabot, Presiding Chairman, Subcomm. on Crime of the H. Comm. on the Judiciary).

9. *Id.*

10. MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 5 (2009), available at www.fas.org/sgp/crs/natsec/R40764.pdf; Robin Acton, *War Zone Contracting Termed Huge "Failure,"* PITTSBURGH TRIB.-REV., May 4, 2009.

11. Cf. 145 CONG. REC. S7925 (daily ed. June 30, 1999) (statement of Sen. Patrick Leahy).

12. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–3267 (2006)).

13. See 18 U.S.C. § 3261(a) (2000).

amended in 2004 to further expand jurisdiction to include contractors of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”¹⁴

Three years later, the Nisour Square incident occurred and MEJA, which had been virtually unused since its enactment, was wielded by federal prosecutors to assert criminal jurisdiction over the Blackwater guards. This incident, however, quickly revealed the potential limitations of this relatively new and untested law. Since all the accused Blackwater guards were under contract with the Department of State, and not the DoD, the jurisdiction question became trickier. In order for Blackwater guards to fall under MEJA, the courts were required to find that their employment “relate[d] to supporting the mission of the Department of Defense overseas.”¹⁵ Due to questions raised as to whether the guards’ employment related to supporting the mission of the DoD mission overseas, the possibility that the guards involved in the shooting may have fallen into the notorious jurisdictional gap prompted new legislative proposals to further amend MEJA.¹⁶

The uncertainty surrounding U.S. criminal jurisdiction in these cases is the latest chapter in a long history of attempts to effectively and consistently handle crimes committed overseas by U.S. civilians and others working under the auspices of the U.S. government.¹⁷ With strong evidence that U.S. reliance on civilian contractors will continue to grow significantly in the coming years, the problem of maintaining effective criminal enforcement over civilian employees and contractors of the U.S. government may be expected to grow as well.¹⁸

This Article will examine the background to the jurisdictional gap and analyze historical and contemporary attempts, such as

14. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811, 2066 (2004) (codified as amended at 18 U.S.C. § 3267(1)(A)(ii)(II) (2006)).

15. 18 U.S.C. § 3267(1)(A)(ii)(II).

16. See e.g., MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2(a) (2007) (seeking to add contractors of any department or agency of the United States working in or near an area where U.S. forces are executing a contingency operation to the list of persons who may be held criminally liable by the United States for certain crimes outside of U.S. borders).

17. See *Hearing*, *supra* note 8.

18. See Acton, *supra* note 10 (“[R]etired Lt. General William Gus Pagonis, director of logistics for the Persian Gulf War in 1991, said the military cannot function without third-party support because private contractors allow troops to focus on the combat mission. ‘There have been over a million troops rotated in and out of Iraq and Afghanistan. If not for third-party contractors, we would have needed 4 million,’ Pagonis said. ‘I don’t know how we’d do that without the draft.’”).

MEJA and a recent amendment to the Uniform Code of Military Justice, to expand court-martial jurisdiction over civilians. This analysis will demonstrate that both MEJA and attempts to subject civilian contractors overseas to trial by military court-martial are short-sighted and insufficient solutions in light of the continuing growth of large numbers of civilians overseas. In light of these deficiencies, this Article will propose that Congress create a system of overseas Article III courts as a comprehensive and long-term solution to address the problem of overseas criminal activity by civilians.

In Part I of this Article, I will examine the background of the jurisdictional gap and explain its nascence during the 1950s. In Part II, I will describe Congressional attempts to address the gap including the Military Extraterritorial Jurisdiction Act of 2000 and a 2006 amendment to the UCMJ that ostensibly expanded military courts-martial jurisdiction over civilians. In Part III, I will explain why these Congressional remedies have been ineffective and will not provide a viable long-term solution to the challenges posed by civilians serving overseas. In Part IV, I will show why use of the military justice system to adjudicate criminal charges against civilians is particularly ill-advised in light of the adverse effects on military commanders and the military justice system in addition to the obvious constitutional concerns such a regime raises. In Part V, I will outline a solution to the jurisdictional gap by proposing that Congress create an Article III court overseas to address these long-standing concerns. Finally, in Part VI, I will discuss possible objections to the proposal for overseas courts.

I. BACKGROUND TO THE PROBLEMS OF OVERSEAS CRIMINAL ACTIVITY

Traditionally, a nation's criminal jurisdiction usually ended at its borders,¹⁹ and crimes were ordinarily proscribed, tried, and punished in accordance with the law of the place where they occurred.²⁰ However, exceptions to this general rule have long been recognized and incorporated into customary international

19. Brian L. Porto, Annotation, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 A.L.R. FED. 2D 415, 415 (2005).

20. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (holding the near-universal rule that the lawfulness of an act is determined by the law of the country where the act is done).

law²¹—and sovereign nations have imposed criminal sanctions for acts committed in a variety of circumstances outside their borders.²²

Since its founding, the United States has consistently encountered situations requiring the extraterritorial application of its criminal laws.²³ Since there is no constitutional bar, determining the extent to which laws apply outside the United States is generally a matter of statutory rather than constitutional construction.²⁴ As a basic principle of statutory construction, criminal laws are presumed to have only territorial application unless there is a clear indication that Congress meant for them to apply extraterritorially.²⁵ Sometimes the task of determining whether statutes apply extraterritorially is relatively simple because Congress expressly states in the statutes themselves that they apply extraterritorially. At other times the task is more challenging, and a court must struggle to determine whether Congress may have implied an intent for a law to apply extraterritorially.²⁶ Over the years Congress has passed many laws that have been interpreted to have extraterritorial application.²⁷ Although the complete list of crimes runs several pages, a few examples include:

18 U.S.C. § 81 (arson)

18 U.S.C. § 113 (assault)

21. Customary international law recognizes five bases on which a state may exercise criminal jurisdiction over a citizen or noncitizen for acts committed outside of the prosecuting state: (1) the “objective territorial principle,” which provides for jurisdiction over conduct committed outside a state’s borders that has, or is intended to have, a substantial effect within its territory; (2) the “nationality principle,” which provides for jurisdiction over extraterritorial acts committed by a state’s own citizen; (3) the “protective principle,” which provides for jurisdiction over acts committed outside the state that harm the state’s interests; (4) the “passive personality principle,” which provides for jurisdiction over acts that harm a state’s citizens abroad; and (5) the “universality principle,” which provides for jurisdiction over extraterritorial acts by a citizen or noncitizen that are so heinous as to be universally condemned by all civilized nations. Porto, *supra* note 19, § 2; *see also id.* §§ 23–30.

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); *cf.* Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); 44B AM. JUR. 2D *International Law* § 89 (2007).

23. Porto, *supra* note 19, at 415.

24. *Cf.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173, 188 (1993); *Arabian Am. Oil Co.*, 499 U.S. at 248. These cases cite to the principle found in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949), that since Congress may pass laws that apply both inside and outside the territorial boundaries of the United States, we will normally presume only territorial application unless Congress clearly indicates that it has consciously decided to pass laws that extend U.S. jurisdiction outside its territorial borders.

25. *Haitian Ctrs. Council, Inc.*, 509 U.S. at 173; *Arabian Am. Oil Co.*, 499 U.S. at 248.

26. *See, e.g.*, *United States v. Bowman*, 260 U.S. 94, 97–98 (1922).

27. These laws generally fall into three main categories: offenses occurring in the special maritime and territorial jurisdiction, offenses occurring in the special aircraft jurisdiction, and those related to treaties with foreign nations. *See generally* Porto, *supra* note 19, at 415.

- 18 U.S.C. § 114 (maiming)
- 18 U.S.C. § 117 (domestic assault by an habitual offender)
- 18 U.S.C. § 546 (smuggling goods into a foreign country from an American vessel)
- 18 U.S.C. § 661 (theft)
- 18 U.S.C. § 662 (receipt of stolen property)
- 18 U.S.C. § 831 (threats, theft, or unlawful possession of nuclear material or attempting or conspiring to do so)
- 18 U.S.C. § 1025 (false pretenses)
- 18 U.S.C. §§ 1081–1083 (gambling ships)
- 18 U.S.C. § 1111 (murder)
- 18 U.S.C. § 1112 (manslaughter)
- 18 U.S.C. § 1113 (attempted murder or manslaughter)
- 18 U.S.C. § 1115 (misconduct or neglect by ship officers)
- 18 U.S.C. § 1201 (kidnapping)
- 18 U.S.C. § 1363 (malicious mischief)
- 18 U.S.C. § 1460 (sale or possession with intent to sell obscene material)
- 18 U.S.C. § 1466A (obscene visual representation of sexual abuse of children)
- 18 U.S.C. § 1587 (captain of a slave vessel with slaves aboard)
- 18 U.S.C. § 1591 (sex trafficking of children)

Therefore, there is longstanding and continuing authority for the imposition of criminal sanctions for activities that occur outside U.S. territory.

For more than a century the United States relied on three primary institutions to impose criminal sanctions for crimes committed outside U.S. territory: U.S. district courts located inside the United States, overseas consular courts, and overseas military courts-martial. Up until the 1950s the responsibility for handling overseas criminal misconduct fell mainly to consular courts and military courts-martial, with U.S. district courts inside the U.S. having only rare involvement in these types of cases.²⁸

28. For a history of U.S. military courts-martial see WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). Although little is known by the general public about

Convened near the situs of alleged offenses and having ready access to evidence and witnesses, consular courts and military courts-martial were the default fora for most overseas offenses and were valued in part because of their ability to deliver justice much more swiftly and efficiently than federal district courts back in the United States. However, the virtues of these somewhat peculiar ad hoc tribunals did not immunize them from long-standing criticism for imposing serious criminal sanctions on individuals without providing them with important protections guaranteed by the Constitution. Despite frequent criticism on these grounds, as well as charges of corruption in the consular courts, these institutions tried American citizens overseas up until 1956.²⁹ It was during that year that two significant events took place. First, Congress repealed the statutes authorizing consular courts and closed the last consular court in Morocco.³⁰ Second, the U.S. Supreme Court decided the landmark case of *Reid v. Covert*, in which a plurality of the Court held that the jurisdiction of military courts-martial to try civilians who are American citizens is extremely limited and reversed the court-martial convictions of two military spouses for the murders of their husbands overseas.³¹

A. U.S. Consular Courts

U.S. consular courts were established by Congress under its Article I power in the mid-nineteenth century and were authorized to exercise both criminal and civil jurisdiction.³² Expressly permitted by treaties with foreign nations, these consular tribunals were convened by embassy staff overseas and typically resolved cases involving U.S. citizens.³³ However, the most famous case construing

consular courts and military courts-martial, these two esoteric non-Article III institutions have fascinating histories and lineages going back several centuries.

29. CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, *FEDERAL PRACTICE AND PROCEDURE* § 4107, at 20 (3d ed. 2007).

30. On August 1, 1956, Congress repealed the laws that gave consular courts their power. Pub. L. 84-857, 70 Stat. 774 (repealing 22 U.S.C. §§ 141-143 (1954)). Section 141 related to the judicial authority generally of ministers and consuls of the United States in China, Siam, Turkey, Morocco, Muscat, Abyssinia, Persia, and the territories formerly a part of the Ottoman Empire including Egypt. Section 142 related to the general criminal jurisdiction of ministers and consuls of the United States. Section 143 related to the general jurisdiction of ministers and consuls of the United States and venue in civil cases. The power of courts-martial over civilians was greatly restricted in *Reid v. Covert*, 354 U.S. 1 (1957), and *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970).

31. 354 U.S. at 5.

32. BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "consular courts").

33. See *In re Ross*, 140 U.S. 453, 461-62 (1891); see also 22 U.S.C. § 142 (criminal matters); 22 U.S.C. § 143 (civil matters).

the power of consular courts involved the exercise of criminal jurisdiction over a foreign national. In the case of *Ross v. McIntyre*, decided by the U.S. Supreme Court in 1891, the power of consular courts to impose criminal sanctions without the protections of the Constitution was challenged by a seaman who was convicted of murder by a U.S. consular court sitting in Japan.³⁴ Ross, the defendant, was a British citizen accused of murdering an American merchant seaman aboard a U.S. merchant vessel in the port of Yokohama, Japan. As the right to a jury did not attach under the rules for consular courts, Ross was convicted and sentenced to death by a court composed of the Consul General and four associate consuls.³⁵

Although the death sentence was eventually commuted to life imprisonment by President Rutherford B. Hayes,³⁶ Ross pursued an appeal to the U.S. Supreme Court and argued that his trial by consular court was invalid since he had been deprived of the Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to trial by jury.³⁷ The Court rejected Ross's arguments and affirmed the criminal jurisdiction of consular courts, finding that the practice of subjecting persons serving on merchant vessels outside the territory of the United States to trial by consular officials was a well-established practice of "Christian" nations and that the constitutional protections provided by the Fifth and Sixth Amendments did not extend beyond the territory of the United States.³⁸ In ratifying the criminal jurisdiction exercised by consular courts, the Court made clear that the jurisdiction of these consular courts extended even to citizens of other countries so long as treaties with host nations allowed the exercise of such jurisdiction.³⁹

Notwithstanding the decision in *Ross*, consular courts continued to be the targets of constant criticism for their corruption and

34. 140 U.S. 453, 454 (1891).

35. *Id.*

36. *Id.* at 454–55.

37. *Id.* at 463–64. Ross also argued that he was a British citizen and the consular courts had no power to try a foreigner for criminal offenses. The Supreme Court rejected this contention as well, finding that when he agreed to serve on an American merchant vessel he consented to the jurisdiction of the United States. *Id.* at 472–73.

38. This view was later repudiated in *Reid v. Covert*, 354 U.S. 1, 4–5 (1957). The Court in that case stated that "[i]nsofar as [*Ross v. McIntyre*] expressed a view that the Constitution is not operative outside the United States . . . it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution . . ." *Id.* at 56.

39. *Ross*, 140 U.S. at 474–75.

failure to provide constitutional protections.⁴⁰ This criticism eventually became strident enough to lead Congress into another little-known experiment, the creation of the U.S. Court for China in 1906. Composed of a U.S. District Court judge sitting in mainland China, the U.S. Court for China heard civil and criminal cases for almost forty years until it was abolished by Congress in 1943.⁴¹ While this Article will not dwell on the colorful history of this court, it is important to recognize that the prior existence of the consular courts and the U.S. Court for China serves as precedent for the establishment of non-military criminal courts outside U.S. territory, a principle for which this Article will later advocate.⁴²

B. Military Courts-Martial

During the same period, the other primary method of holding civilians criminally accountable overseas was by subjecting them to trial by military courts-martial. Trial of civilians by military courts, although never commonplace, was a well-established practice adopted from the British Articles of War by the Continental Congress during the American Revolution.⁴³ The first American Articles of War contained the following provision: "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with our Armies in the Field, though no [sic] enlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War."⁴⁴ Although the term sutler has fallen from regular usage, during this time period the word referred to civilians who provided soldiers with food and provisions.⁴⁵ Suttlers normally set up shop near

40. See Herbert H.D. Pierce, Report on Inspection of the United States Consulates in the Orient, H.R. Doc. No. 59-665, at 322-444 (1906).

41. An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, Pub. L. No. 59-403, 34 Stat. 814 (1906), *repealed by* Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.-China, Jan. 11, 1943, 57 Stat. 767.

42. The judges for the U.S. Court for China handed down decisions in both criminal and civil cases. Among the greatest challenges faced by the judges on this court was what law to apply. The court enjoyed significant discretion in choosing which law to apply and this aspect alone is an interesting historical curiosity in the annals of American law. See Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China* (Emory Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 09-67, 2009), available at <http://ssrn.com/abstract=1485687>.

43. See WINTHROP, *supra* note 28, at 98.

44. British Articles of War of 1765, art. XXIII, *reprinted in* WINTHROP, *supra* note 28, at 921, 941. The Article first appeared in 1747. FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE 21-22 (1967).

45. See, e.g., 2 JOHN BOUVIER, A LAW DICTIONARY: ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERI-

military encampments or accompanied forces in the field when they were deployed. The term “retainer” referred mainly to wives or significant others who resided in the vicinity of military encampments.⁴⁶ Thus, the Articles of War explicitly authorized the exercise of jurisdiction over civilians who remained in close contact with military forces through either business or personal relationships.

George Washington made significant use of civilian contractors to support his forces in the field, mainly in providing supply and logistical services to the Continental Army.⁴⁷ In accordance with the American Articles of War, largely adopted verbatim from the British Articles of War, civilians have been subject to military criminal jurisdiction from the days of the founding of the Republic.⁴⁸ The practice continued up through the American Civil War when military operations of unprecedented scale in America caused great numbers of civilians to come into contact with the armies of both sides.⁴⁹ The U.S. Civil War was characterized by a vast expansion in the exercise of military jurisdiction over civilians, both those supporting the armed forces and those who happened to be living or working within a particular army’s area of operations. Military jurisdiction over unaffiliated civilians was mainly asserted in areas where civil order had broken down, but sometimes it was asserted in areas where this was not the case.

The U.S. Supreme Court decided a case shortly after the end of the war that dramatically narrowed the situations when civilians could be tried by military courts on U.S. territory. In *Ex Parte Milligan*, the Court curtailed the power of military commanders to hold and try civilians before military tribunals.⁵⁰ The case arose in 1864 during the final months of the Civil War when a civilian named

CAN UNION 546 (2d ed. 1843) (defining “sutler” as “[a] man whose employment is to sell provisions and liquor to a camp”).

46. See David L. Snyder, *Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT’L L.J. 1, 73 (2008).

47. See PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 19–40 (2003).

48. For a concise summary of the origins of military jurisdiction over civilians, see Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 501 (2008).

49. See WINTHROP, *supra* note 28, at 97–101; see also *The Civil War*, PBS, <http://www.pbs.org/civilwar/war/> (last visited Oct. 20, 2010) (“More than 3 million Americans fought in it, and over 600,000 men, 2 percent of the population, died in it. . . . In two days at Shiloh, on the banks of the Tennessee River, more American men fell than in all the previous American wars combined. At Cold Harbor, some 7,000 Americans fell in twenty minutes.”).

50. 71 U.S. (4 Wall.) 2, 3 (1866).

Milligan was arrested by federal military authorities and charged with conspiracy to overthrow the United States.⁵¹ Milligan was convicted by a military tribunal convened by a federal army commander and sentenced to death.⁵² However, Milligan's execution was delayed until the end of the war, and in the meantime his case made its way to the U.S. Supreme Court on appeal.⁵³ In ruling that military tribunals may not try civilians in areas where civil courts are still open, the Court drew heavily upon the Founding Fathers' negative experiences with British military law in the period leading up to the Revolution.⁵⁴

Even though *Ex Parte Milligan* effectively ended the use of military courts to try civilians inside the United States, due to the absence of any U.S. or state court system overseas, the practice of allowing trial of civilians connected with the military by military courts-martial outside the territory of the United States continued for almost a century after *Milligan* was decided. A new round of Articles of War reaffirmed the practice of subjecting civilians to trial by courts-martial overseas in 1916.⁵⁵ Article 2(d) of the Articles of War was revised to extend courts-martial jurisdiction to "[a]ll retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States."⁵⁶ During World War II the practice was never seriously questioned even though hundreds of civilians were tried and punished by courts-martial.⁵⁷ However, there was bitter criticism from former service members who had faced the harsh military justice system during the course of the war. Their anger at the unfairness of the system led to a very strong movement to reform military justice.

In response to this movement, Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950 to modernize and standardize military criminal law and procedure across the services.⁵⁸ Created with the input of criminal law scholars and military justice experts, the new code reaffirmed the principle that civilians could be subject to trial by courts-martial in certain situations. Those situations were set forth in 10 U.S.C. § 802(a)(10)–(12) as follows:

51. *Id.* at 6.

52. *Id.* at 7.

53. *See id.* at 8.

54. *Id.* at 37–38.

55. *See* Law of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 650–70 ("The articles included in this section shall be known as the Articles of War . . .").

56. *Id.* at 651 (article 2(d) of the Articles of War).

57. Lisa Turner, *The Articles of War and the UCMJ*, AEROSPACE POWER J., Fall 2006, at 99.

58. *See* Act of May 5, 1950, Pub. L. 81-506, 64 Stat. 107 (codified as amended at 10 U.S.C. §§ 801–946 (2006)).

(a) The following persons are subject to this chapter:

. . . .

(10) In time of war . . . , persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Within a decade of the code's promulgation the Supreme Court was called upon to decide whether the prosecution of civilians in a court-martial based on jurisdiction under 10 U.S.C. § 802(a)(11) was constitutional. In the landmark case of *Reid v. Covert*,⁵⁹ the Court reviewed for a second time the cases of two civilian wives of service members stationed overseas who had been convicted of murder by military courts-martial. During the previous term, a majority of the Court had held that the provisions of Article III and the Fifth and Sixth Amendments—which require that crimes be tried by a jury after indictment by a grand jury—did not protect a U.S. citizen when tried by the U.S. government in foreign lands for offenses committed there, and that Congress could provide for the trial of such offenses in any manner it saw fit so long as the procedures established were reasonable and consonant with due process.⁶⁰

In *Reid* the Court reversed this decision and held that the rights guaranteed by Article III, Section 2; the Fifth Amendment; and Sixth Amendment continued to protect U.S. citizens in criminal proceedings brought by the United States against them overseas.⁶¹

59. 354 U.S. 1 (1957).

60. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955).

61. *Reid*, 354 U.S. at 5 (plurality opinion).

One key question turned upon the interpretation of some particular language of the Fifth Amendment. The Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.*”⁶²

The Court discussed the language of the Fifth Amendment which requires grand jury indictment “except in cases arising in the land and naval forces” and determined that the cases against the civilian dependents of military officers do not “aris[e] in the land or naval forces.”⁶³ The Court also discussed the constitutional and historical reasons why military courts-martial jurisdiction arises only against those who are *part* of the armed forces.⁶⁴ Contrary to the holding in *Ross*, the Court stated unequivocally that when the United States acts against its citizens abroad, it can do so only in accordance with all the limitations imposed by the Constitution, including Article III and the Fifth and Sixth Amendments. However, with respect to the possibility of trying civilians before courts-martial, one passage in *Reid* left open a small crack that was to be used to justify the prosecution of civilian contractors by courts-martial during the Vietnam War:

Even if it were possible, we need not attempt here to precisely define the boundary between “civilians” and members of the “land and naval Forces.” We recognize that there might be circumstances where a person could be “in” the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.⁶⁵

Because the cases before the Court in *Reid* involved civilian dependents with little other connection to the military, the military continued to use courts-martial to hold contractors and other civilians who were assisting the armed forces in the field criminally accountable under 10 U.S.C. § 802(10). In 1967, the U.S. Court of Military Appeals held that *Reid* precluded the court-martial of a civilian contractor in Vietnam since he was not part of the armed forces and since the events giving rise to charges took place during the absence of a *declared* war.⁶⁶

62. U.S. CONST. amend. V (emphasis added).

63. *Reid*, 354 U.S. at 19 n.38.

64. *See id.* at 19–21.

65. *Id.* at 22–23.

66. *United States v. Averette*, 41 C.M.R. 363, 364 (C.M.A. 1970).

These cases led to the creation of the “jurisdictional gap.” As noted, *supra*, this “jurisdictional gap” is a recurring situation where civilians serving the U.S. government commit crimes outside the criminal jurisdiction of the United States, but are not subject to effective criminal accountability by another sovereign.⁶⁷ Because of the limited public visibility of cases arising overseas, the jurisdictional gap received little attention despite the insistent calls of military commanders for Congress to take action. However, beginning in the early 1970s the DoD began privatization, a cost-saving initiative to “outsource” many jobs that had previously been performed by military members to civilian firms.⁶⁸ This movement was greatly accelerated through the Reagan, Clinton, and both Bush administrations. Jobs subject to privatization mainly included tasks like supply, logistics, and food services.⁶⁹ The theory behind privatization was that competition for contracts among civilian providers would reduce costs and increase quality in ways that could not be accomplished by leaving these jobs in the hands of military members. One consequence of the privatization program was to substantially increase the number of civilians serving with the military both at home and abroad. Once the wars in Iraq and Afghanistan began, this effect was even more dramatic as more than 200,000 civilians—up to 40,000 of them Americans—served overseas under lucrative contracts with the U.S. government to provide a multitude of different services.⁷⁰

While the number of U.S. citizens serving overseas has risen over the past fifty years—gradually at first, then dramatically with privatization—the abandonment of consular courts and the loss of military courts-martial jurisdiction were the most significant factors

67. See *supra* text following note 4.

68. See Ann R. Markusen, *The Case Against Privatizing National Security*, 16 GOVERNANCE 471, 474 (2003).

69. The jobs performed by contractors include

guarding officials, military installations, and supply convoys; training local troops and police forces; providing interrogators, translators, and transcribers; maintaining and repairing vehicles and aircraft, including the guidance and surveillance systems on tanks and helicopters; running logistics operations and supervising supply lines; driving supply trucks that carry fuel and food; providing warehousing and storage facilities; setting up Internet access and maintaining computer systems; preparing meals for . . . soldiers; cleaning military facilities, including Army bases and offices; washing clothes; and building housing.

Esther Pan, *Iraq: Military Outsourcing*, COUNCIL ON FOREIGN RELATIONS (May 20, 2004), <http://www.cfr.org/publication/7667/iraq.html#p5>.

70. See MOSHE SCHWARTZ, CONG. RESEARCH SERV., DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 5 (2009).

in creating the jurisdictional gap. We now turn to examine several attempts that have been made to remedy the jurisdictional gap.

II. CONGRESSIONAL ATTEMPTS TO FIX THE JURISDICTIONAL GAP

A. *The Military Extraterritorial Jurisdiction Act*

After decades of concern about this jurisdictional gap, Congress attempted to remedy the problem by passing the Military Extraterritorial Jurisdiction Act (MEJA) in 2000.⁷¹ The debate and passage of MEJA was hastened by the decision of the Second Circuit in *United States v. Gatlin*, which overturned the guilty plea of an American accused of the sexual abuse of his step-daughter while living in Germany.⁷² Relying on the pre-MEJA decisions of the U.S. Supreme Court, the Second Circuit held that the accused fell outside the criminal jurisdiction of the United States since he was living in Germany at the time of the alleged offenses.⁷³ Because the accused fell into the gap, the Second Circuit's decision reversed his conviction despite his sentence to fifteen years in prison by the federal district court.⁷⁴ The German government chose not to exercise jurisdiction, so when Gatlin went scot-free the outrage generated by this result created the momentum sufficient to spur Congress to finally act.⁷⁵

On November 22, 2000, President Bill Clinton signed MEJA into law, extending federal criminal jurisdiction to members of the armed forces and those civilians employed by or accompanying the armed forces outside the United States.⁷⁶ MEJA's grant of jurisdiction extended only to those crimes which would be considered

71. Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261-3267 (2006)).

72. *United States v. Gatlin*, 216 F.3d 207, 216 (2d Cir. 2000) (holding that it was clear from the legislative history that Congress intended 18 U.S.C. § 7(3) to apply exclusively to the territorial United States, and therefore the overseas military housing area was not within the special maritime and territorial jurisdiction).

73. *See id.* at 220.

74. *See id.* at 223.

75. The Act extended the criminal jurisdiction of the United States to conduct committed outside the United States that would constitute a felony under federal law if engaged in within the special maritime and territorial jurisdiction of the United States. The new criminal provision applied only to two groups of people: persons employed by or accompanying the armed forces outside of the United States and persons who are members of the armed forces. The punishment for committing a qualifying crime under the statute is that which would have been imposed under federal law had the crime been committed in the United States. *See* 18 U.S.C. § 3261(a).

76. *See id.*

felony offenses if committed within the special maritime and territorial jurisdiction of the United States. Although members of the armed forces were already subject to federal law under the UCMJ, MEJA also made them ostensibly subject to prosecution for violations of the federal criminal code while serving overseas as well. However, by its own terms MEJA severely limited jurisdiction over service members to instances when they were no longer subject to the UCMJ or when they were charged with committing an offense with one or more other defendants, at least one of whom was not subject to the UCMJ.⁷⁷ Therefore, the title of MEJA is misleading in its suggestion that the act is aimed at military members. The actual extension of jurisdiction to military members is extremely limited under MEJA.

The real focus of MEJA was on making DoD civilians and contractors living and working overseas amenable to criminal prosecution.⁷⁸ However, the language of MEJA left significant uncertainty as to which persons would be considered “employed by or accompanying the armed forces outside the United States.” This proved problematic when the Abu Ghraib prison scandal broke in April 2004. While U.S. military members were prosecuted under the UCMJ for abusing detainees, their civilian counterparts who were equally culpable escaped criminal liability.⁷⁹ Although there was a great deal of talk by members of the Bush Administration about prosecuting them under MEJA, they soon realized that the language of MEJA did not cover them because they were under contract with the CIA and Department of Interior.⁸⁰

Once again reacting to another crisis, Congress amended MEJA in 2004, explicitly extending jurisdiction to civilian members of agencies and contractors of those agencies “to the extent [their] employment *relates to supporting the mission of the Department of Defense overseas*.”⁸¹ However, this ambiguous amendment left a substantial number of unresolved questions as to whether certain groups who work closely with the armed forces have employment that “relates to supporting the mission of the Department of Defense overseas.” Even more troubling in some ways is that MEJA left a broad group of persons who arguably should have been within the statute’s reach clearly outside its ambit. Those persons included contractors like the Blackwater employees involved in the

77. See *id.* § 3261(d).

78. See H.R. REP. NO. 106-778, at 4–5 (2000).

79. See Tara McKelvey, *The Unaccountables*, AM. PROSPECT, Sept. 2006, at 44, 47.

80. See *id.*

81. 18 U.S.C. § 3267(1)(A)(i)(II) (emphasis added).

Nisour Square incident working for other governmental agencies like the Department of State.

Although this problem had long been recognized and lamented in many scholarly publications, it did not receive much public attention until the high-profile shooting incident involving Blackwater contractors on September 16, 2007 finally brought widespread public awareness to this jurisdictional issue. Because these Blackwater employees were not under DoD contract and were providing security to diplomatic and political personnel under a contract with the State Department, they arguably fell outside the definition of persons “supporting the mission of Department of Defense overseas.” Although this issue was never resolved because the cases arising from the Nisour Square incident were dismissed in late December 2009,⁸² this was the argument that attorneys for the accused Blackwater contractors had made prior to the case’s dismissal.⁸³

Although MEJA has been in place since 2000, it has proven to be largely toothless; between 2000 and 2008 only twelve cases were brought by the Department of Justice under MEJA.⁸⁴ The ineffectiveness of MEJA was raised not only with respect to the Abu Ghraib scandal, but also with respect to a pattern of alleged sexual assaults by contractors overseas. The U.S. Senate Committee on Foreign Relations held hearings on this issue in April 2008 only to be informed that no prosecutions had been brought for sexual assaults on employees of government contractors like Kellogg, Brown, and Root despite dozens of complaints being filed.⁸⁵

B. Amendment to the UCMJ

Simmering in the background was another approach that would require amendment of Article (2)(10) of the UCMJ to allow military commanders to assert courts-martial jurisdiction over civilians accompanying the armed forces during contingency operations—

82. See Timothy Williams, *Iraqis Angered at Dropping of Blackwater Charges*, N.Y. TIMES, Jan. 1, 2010, at A1.

83. Defendants’ Motion to Dismiss for Lack of Jurisdiction at 2, *United States v. Slough*, 679 F. Supp. 2d (D.D.C. 2010) (No. 1:08-CR-360-RMU).

84. *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment: Hearing Before the Subcomm. on Int’l Operations & Orgs., Democracy & Human Rights of the S. Comm. on Foreign Relations*, 110th Cong. 42 (2008) (statement of Sigal P. Mandelker, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice).

85. *Id.* at 1–3 (statement of Sen. Bill Nelson, Chairman, Subcomm. on Int’l Operations & Orgs., Democracy & Human Rights).

the idea being to close at least part of the gap created by *Reid* and *Averrett*. An Overseas Jurisdiction Advisory Committee created at Congressional direction and composed of attorneys for the military departments, the Departments of Defense, Justice, and State had studied the problem and recommended amending the UCMJ so that civilians would fall under court-martial jurisdiction when supporting contingency operations.⁸⁶ However, the DoD rejected this recommendation because it presented “unique constitutional questions” and would give rise to “several significant anomalies in the existing structure governing civilian disciplinary matters.”⁸⁷ Because the DoD did not support the recommendation, it did not make it into the final version of MEJA that was passed by Congress.

However, supporters of this approach finally had their way when a five-word amendment inserted into the FY2007 Defense Appropriation Act passed without debate or careful consideration by Congress. The original language of the provision stated that the UCMJ applied to the following category of persons:

(10) In time of war, persons serving with or accompanying an armed force in the field.⁸⁸

The amendment to the UCMJ passed in the appropriation bill struck the word “war” following “In time of” and inserted “declared war or a contingency operation.”⁸⁹ Thus, the new provision applied the UCMJ to the following category of persons:

(10) In time of declared war or contingency operation, persons serving with or accompanying an armed force in the field.⁹⁰

The term “contingency operation,” defined by reference to another provision of the U.S. Code, means a military operation that “is designated by the Secretary of Defense as an operation in which

86. *Id.*

87. *Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 8 (2000) (statement of Robert E. Reed, Associate Deputy General Counsel, Department of Defense). There was discussion in the MEJA committee hearings about this approach. *Id.* An overseas jurisdiction advisory committee—comprised of attorneys for the military department, the Departments of Defense and Justice, and an attorney from the State Department—made recommendations. *Id.*

88. 10 U.S.C. § 802(a)(10) (2000).

89. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (“Paragraph (10) of section 801(a) of title 10, United States Code . . . , is amended by striking ‘war’ and inserting ‘declared war or a contingency operation.’”).

90. 10 U.S.C. § 802(a)(10) (2006).

members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force.”⁹¹

Although this was a potentially significant change to the criminal jurisdiction contractors faced, the amendment was inserted into the FY2007 Defense Appropriation Act without discussion and completely bereft of legislative history to assist in its interpretation. Senator Lindsey Graham of South Carolina, who is generally credited for insertion of the provision, declared with satisfaction, “[t]his will bring uniformity to the commander’s ability to control the behavior of people representing our country.”⁹² However, despite Senator Graham’s optimistic forecast, to date the new amendment has been utilized only once—against a non-US citizen who was serving as a contractor.⁹³ On June 22, 2008, Alaa Mohammad Ali, an Iraqi with dual Canadian citizenship serving as an interpreter for U.S. forces in Iraq, pleaded guilty to the wrongful appropriation of a knife, obstruction of justice, and making a false statement.⁹⁴ Ali was tried and sentenced by a general court-martial and was awarded five months confinement by the presiding military judge.⁹⁵ His appeals to the military appellate court system have been summarily denied.⁹⁶

III. WHY THE MEJA SOLUTION ALONE IS INSUFFICIENT TO ADDRESS THE PROBLEMS

The small number of cases that have been prosecuted under MEJA is evidence of its minimal effectiveness. As stated above, between 2000 and 2008, only a total of twelve cases were brought by the Department of Justice under MEJA.⁹⁷ This fact allows us to draw some interesting inferences concerning the relative effectiveness of MEJA in addressing serious crime. According to the FBI, the average violent crime rate between 2001 and 2008 was 475 per

91. *Id.* § 101(a)(13)(A).

92. Griff Witte, *New Law Could Subject Civilians to Military Trial: Provision Aimed at Contractors, but Some Fear It Will Sweep Up Other Workers*, WASH. POST, Jan. 15, 2007, at A1, A11 (quoting Sen. Lindsey Graham).

93. See Press Release, Multi-National Corps, Public Affairs Office, Camp Victory, Civilian Contractor Convicted at a Court-Martial (June 22, 2008).

94. *Id.*

95. *Id.*

96. See *Ali v. Austin*, 67 M.J. 186 (C.A.A.F. 2008); *Ali v. Austin*, 67 M.J. 168 (C.A.A.F. 2008).

97. See *supra* note 84 and accompanying text.

100,000 persons.⁹⁸ The FBI considers only four types of offenses as falling within its definition of violent crime: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault.⁹⁹ Although these are all considered felony-level offenses, they comprise only a portion of total felonies: those that are considered particularly dangerous ones.

Assuming conservatively that there were 300,000 civilian employees and contractors of the U.S. government overseas and that they committed violent felony crimes at the same rate as the general U.S. population, there would have been approximately 11,404 violent crimes committed between the beginning of 2001 and the end of 2008. However, comparing the particular civilian employees, dependents, and contractors of the U.S. government to the general population might be unfair as there is a certain amount of screening that applies to these individuals. Even if we cut this figure by seventy-five percent for the sake of argument, there would have been approximately 3000 violent felonies committed. Thus, the choice to prosecute only twelve cases of a likely 3000 gives us a prosecution rate of approximately four-tenths of a percent. This rate seems unreasonably small, and unless the civilian population serving in Iraq and other overseas locations are substantially more law-abiding than members of the population, MEJA has been a failure.

If we look at current procedures for initiating prosecutions under MEJA perhaps we can understand how the difficulties associated with the logistics of prosecutions may help to account for the low number of prosecutions. Currently, defendants prosecuted under MEJA are brought to trial in accordance with 18 U.S.C. § 3238, which provides that the accused shall be tried in the U.S. federal district in which “the offender . . . is arrested or is first brought.”¹⁰⁰ Department of Justice policy currently requires the case to be initially referred to the DOJ Criminal Division’s Human

98. See *Crime in the United States 2008: Table 1—By Volume and Rate Per 100,000 Inhabitants, 1989–2008*, FBI.gov, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2008> (follow “Violent Crime” hyperlink; then follow “Table 1” hyperlink) (last visited Sept. 29, 2010).

99. See *Crime in the United States 2008: Violent Crime*, FBI.gov <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2008> (follow “Violent Crime” hyperlink) (last visited Sept. 29, 2010).

100. 18 U.S.C. § 3238 (2006) (“The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.”).

Rights and Special Prosecutions Section (HRSP).¹⁰¹ HRSP reviews the case for applicability of MEJA and then refers it to what it considers the most appropriate U.S. Attorney's Office (USAO). The USAO then reviews the case and informs HRSP as to whether it intends to proceed with the prosecution.¹⁰² Since MEJA does not clearly delineate the federal district within which prosecutions may be initiated, the current procedure gives a great deal of discretion to the DOJ as to which USAO will prosecute the case. This flexibility is valuable to the DOJ as it potentially allows HRSP to select a USAO that is best-suited to handle the case, taking into consideration such factors as workloads and experience levels of the various USAOs throughout the country. However, since all the cases occur outside the physical boundaries of the federal district, there is little incentive or political pressure for federal prosecutors to want to take up a particular case.

Once the case is assigned to a particular USAO, the Assistant U.S. Attorney (AUSA) charged with prosecuting the case faces significant challenges. Many of the challenges are practical in nature and relate to the difficulty of trying a case in a U.S. federal district court on U.S. soil when all the events that form the basis for the charge occurred in a foreign country. These challenges include procuring witnesses and evidence from an overseas location and potentially bringing them to the United States for trial. Without compulsory process and the ability to control the handling of key evidence, the AUSA handling the case will likely be confronted by a seemingly endless series of obstacles. In sum, these cases have big drawbacks in terms of time investment and difficulties in securing and producing evidence in court. These drawbacks, which likely account for the dearth of cases prosecuted under MEJA, will be ameliorated by establishing overseas courts. By having court proceedings near the situs of criminal offenses, witnesses may be brought to court much more easily since there will be no requirement for them to travel to the United States to testify. Furthermore, prosecutors will likely be able to work very closely with local authorities for the handling and processing of other types of evidence.

It is important to note that I do not advocate the repeal of MEJA, but I submit that it provides only part of the solution. The part that it provides—extraterritorial criminal jurisdiction—is critical to the success of overseas courts. Although MEJA's jurisdictional

101. U.S. ATTORNEY'S MANUAL § 9-20.116, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/20mcrm.htm#9-20.116.

102. *Id.*

grant needs to be broadened to explicitly cover contractors that are not supporting the mission of the DoD, recent proposals to further amend MEJA to cover other categories of persons are certainly steps in the right direction.

IV. WHY USE OF THE MILITARY JUSTICE SYSTEM TO ADJUDICATE CRIMINAL CASES IS ILL-ADVISED

Many academic commentators have advocated subjecting civilians, particularly contractors, to discipline under the military justice system.¹⁰³ Scholars such as Geoffrey S. Corn, William C. Peters, and Lawrence J. Schwarz have argued in various ways that this is the most feasible and just solution to what is likely to be a long-term problem. However, these commentators not only give very little weight to the reasoning in *Reid*, but also fail to consider the cost to military commanders on the ground of executing this additional responsibility. For example, Corn acknowledges the many difficulties associated with applying the full corpus of the UCMJ, but advocates subjecting civilians to summary courts-martial, a watered-down form of court-martial with limited due process and extremely light punishment that is capped at no more than 30-days imprisonment.¹⁰⁴ While sensible in some ways, proposals like this are akin to trying to treat a sucking chest wound with a band-aid. They do little to address the major concerns here—effectively dealing with *serious* criminal misconduct that is going virtually unpunished under the current MEJA regime. William C. Peters, on the other hand, barely acknowledges the serious constitutional issues, while urging application of the UCMJ to civilians in sweeping terms: “Soldiers and civilians accused of like misconduct in a like wartime setting should not answer to different courts, different procedures, and different law.”¹⁰⁵ Such an approach fails to appreciate the fundamental differences between military service members and civilians in a civilized society. Just because applying the UCMJ to civilians in certain situations would be expedient does not provide moral justification for such application of military

103. See Geoffrey S. Corn, *supra* note 48; William C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367; Lawrence J. Schwarz, *The Case for Court-Martial Jurisdiction over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, ARMY LAW., Oct./Nov. 2002, at 31; David L. Snyder, *Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 1 (2008).

104. Corn, *supra* note 48, at 522–37.

105. Peters, *supra* note 103, at 412.

criminal law, a body of law which is fundamentally different in its philosophical underpinnings than ordinary civilian criminal law.

Other commentators, like Katherine Jackson, have articulated the significant shortcomings of attempting to extend military court-martial jurisdiction to civilian contractors.¹⁰⁶ She points out the difference in ways civilians support the armed forces and how the specific type of job that civilians perform would logically have some bearing on whether the assertion of military courts-martial jurisdiction would be justified.¹⁰⁷

A. *The Unique Needs of the Military*

The military justice system is a specialized criminal justice system designed specifically to address the unique needs of the military. Driven mainly by the UCMJ and featuring significant advances over the previous Articles of War, the military justice system has evolved for the specific purpose of maintaining good order and discipline for our national armed forces.¹⁰⁸ Although the UCMJ provides a fair and efficient way of handling the military's unique needs, there are features of the military justice system that are simply incompatible with its use in trying those not in military service. For example, although the UCMJ contains many crimes that also appear in the civilian criminal codes throughout all jurisdictions like larceny, rape, robbery, arson, and murder, the UCMJ also criminalizes many unique military offenses that have no analogue in civilian criminal codes. Examples of these uniquely-military crimes include disrespect toward a superior commissioned officer,¹⁰⁹ assault or willful disobedience of an order,¹¹⁰ absence without leave,¹¹¹ and misbehavior of a sentinel.¹¹² Advocates of applying the UCMJ to civilians have yet to articulate limits on the extent to which military commanders may hold civilians criminally liable. The text of the UCMJ offers no guidance, but it seems unreasonable to argue that the full corpus of the UCMJ applies to all "persons serving with, or accompanying the armed forces" in the field during a contingency operation. Without some principled delineation of crimes that are

106. Katherine Jackson, *Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255 (2007).

107. *Id.* at 283–85.

108. For a history of the UCMJ, see 95 CONG. REC. 5,718 (1949).

109. 10 U.S.C. § 889 (2006).

110. *Id.* § 890.

111. *Id.* § 886.

112. *Id.* § 913.

applicable only to civilians, a significant possibility exists for military officials to prosecute civilians for a whole set of offenses designed to ensure good order and discipline within the military, but having little applicability to civilians. Although not addressed in detail by the recent blue ribbon commission on military justice, concerns over this issue were highlighted for careful consideration.¹¹³

B. Constitutional Concerns

There are also several significant constitutional concerns with having civilians held for trial by courts-martial under the UCMJ. First, under the UCMJ, there is no right to trial by jury for an accused in a military court-martial as is required for civilians under the Sixth Amendment to the U.S. Constitution. The accused in a military court-martial is tried by a panel of military personnel chosen by a senior officer in charge of a major military unit, usually at least a battalion for ground forces and any number of different types of vessels for naval forces.¹¹⁴ This senior officer is designated as the court-martial convening authority (CA) and must select the panel of officers that is convened for the court-martial in each individual case. Unlike selection of the jury pool in a civilian case, the convening authority is required to choose the best qualified members of his command to sit on the court-martial based on "age, education, training, experience, length of service and judicial temperament."¹¹⁵ In this system the convening authority hand-picks the officers who comprise the court-martial. Although this flaw is ameliorated greatly by the opportunity for an accused to voir dire the members and challenge them both peremptorily and for cause, the commander still retains tremendous power by being able to constitute the initial pool in a way that she sees fit. Inherent in this system is the danger of "jury stacking," which is a danger within the military justice system that has long been recognized and repeatedly criticized by commentators.¹¹⁶ Many military justice experts have

113. NAT'L INST. MILITARY JUSTICE & AM. BAR ASS'N, REPORT OF THE COMMISSION ON MILITARY JUSTICE 4 (2009).

114. A battalion is a middle echelon unit in the Army and Marine Corps. Typically it is composed of approximately 600 soldiers or Marines including infantry and support personnel.

115. 18 U.S.C. § 825(d)(2) (2006).

116. See Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?* (2007) (unpublished article), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=victor_hansen.

argued for reducing the CA's power in the court-martial member selection process, and indeed this was one of a handful of critical reforms for the military justice system recommended by the First Cox Commission, a blue ribbon commission tasked with studying military justice ten years ago.¹¹⁷

Another question that has arisen is whether there should be civilian representation on courts-martial that try civilian accused. The UCMJ currently protects enlisted members by giving them the right to have at least one-third of the members of the panel be enlisted.¹¹⁸ This is presumed to be a protection provided to enlisted members to prevent unfair discrimination by officers. Arguably a similar protection should be afforded to a civilian tried by court-martial. The concept of civilian representation on these types of courts-martial finds support in a recent report of the Second Cox Commission released in October 2009.¹¹⁹ This report, while skeptical of subjecting civilians to courts-martial in the first instance, suggested that if such courts-martial were to be pursued against civilians there should be a requirement to have civilians placed on the court-martial panels in trials of civilians.¹²⁰ While I agree with this suggestion in principle, it must be pointed out that such a scheme would require significant changes to the UCMJ as well as the Rules for Courts-Martial.

In addition to selecting the panel who sits on the accused's case, the CA is also responsible for making the decision as to whether there is sufficient evidence to refer the case to a court-martial. Therefore, prosecutorial discretion within the military justice system rests exclusively with the CA, and not with a trained attorney as is the case in all other prosecutions in the United States. This concern is tempered slightly because the UCMJ requires that the CA be advised concerning the disposition of charges before a general court-martial by a staff judge advocate (SJA)—an experienced, law school-trained, and state bar certified military lawyer.¹²¹ However, the CA is free to reject the SJA's advice and proceed to prosecute

117. NAT'L INST. MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 6-8 (2001).

118. U.S. MANUAL FOR COURTS-MARTIAL R. 503(a)(2) (2008).

119. See NAT'L INST. MILITARY JUSTICE & AM. BAR ASS'N, *supra* note 113.

120. *Id.* at 4.

121. U.S. MANUAL FOR COURTS-MARTIAL R. 406. There are three levels of courts-martial: summary, special, and general. A summary court-martial is the lowest level and has been determined not to be a criminal conviction by the U.S. Supreme Court. A special court-martial may order confinement for up to 12 months and roughly corresponds to a misdemeanor-level civilian court. A general court-martial is the highest level military court, roughly equivalent to a felony-level civilian court and may impose any punishment up to an including life imprisonment without parole or death. See Uniform Code of Military Justice, Pub. L. No. 81-506, Art. 16-20, 64 Stat. 107, 113-14 (1950).

or dismiss the charges even if that decision is contrary to the SJA's recommendation.¹²²

*C. The Unique Role of the Commander in the
Military Justice System*

Moreover, use of the UCMJ is problematic because the military commander occupies a unique role in a unique criminal justice system. In the armed forces, the criminal process is inextricably intertwined with the leadership and command function. In the military justice system the decisions of how to proceed in a criminal case are made with respect to the potential impact on the unit's morale, cohesion, good order, and discipline. In the case of a civilian prosecuted under the UMCJ, although similar concerns may arise, they are of a much different magnitude and immediacy.

The military commander's role is already quite demanding and complex, and I submit that placing additional criminal justice responsibilities on a commander because of wholesale "outsourcing" will further degrade the commander's focus from the mission. Further, commanders may be even more distracted because this change in the law will create criminal liability for a military commander based on the misconduct over civilians serving under his command. Although military commanders may currently be held criminally responsible in certain instances for the acts of military members under their command, they have much more control and influence over those situations because of the training and command structure in place in military units over military members. Because such training and structure is largely nonexistent with respect to civilians, the commander would have much less control and influence over their actions. This was yet another concern raised by the Second Cox Commission in its recently released report.¹²³

The UCMJ is a criminal code, and convictions under the UCMJ are federal convictions recognized by state and federal courts throughout the country. Depending on the jurisdiction and the potential maximum imprisonment authorized for the offense under the UCMJ, a court-martial conviction may be treated as a misdemeanor or felony by state courts in determining voting rights, the right to possess firearms, and sexual offender status.¹²⁴

122. U.S. MANUAL FOR COURTS-MARTIAL R. 406.

123. See NAT'L INST. MILITARY JUSTICE & AM. BAR ASS'N, *supra* note 113, at 4.

124. See, e.g., N.M. STAT. ANN. § 31-18-17(D)(2) (1978) (stating that a "prior felony conviction" means any prior felony "for which the person was convicted other than an offense

Court-martial convictions are also used in sentencing guideline schemes present in the federal and state systems which allow courts to enhance punishment for past convictions.¹²⁵ In addition to these concerns, no provision is made in the current UCMJ for a civilian's right to appellate review if convicted under the UCMJ—yet another point recommended for consideration by the Second Cox Commission.¹²⁶

D. The Differing Cultures and Attitudes of Military and Civilian Personnel

Finally, we must bear in mind that military members and civilians are markedly different in culture and attitude. Perceived pay inequities between military members and contractors likely leads to some degree of envy or even contempt for contractors by military personnel.¹²⁷ This resentment could help fuel bias against contractors, perhaps leading to disparate treatment for civilian contractors in courts-martial. There is also the possibility of military CA's turning a blind eye to contractors because they are not responsible for them in the same way that they are responsible for the military members under their command.

V. THE PROPOSED SOLUTION: OVERSEAS ARTICLE III COURTS

Congress should establish a system of permanently staffed extra-territorial overseas courts. Establishment of such an overseas court system has the potential to alleviate some of the major problems that currently exist with both the MEJA and UCMJ approaches. Moreover, the benefits of this proposal accrue to both the prosecution and the defense. Benefits to the prosecution would likely include better access to witnesses and evidence, thus increasing the

triable by court martial"); ORE. REV. STAT. § 161.725(2)(c) (stating that a general court-martial conviction must "also at the time of conviction of the instant crime [qualify as] a felony if committed in [Oregon]"); *State v. Mitchell*, 659 S.W.2d 4, 6 (Mo. Ct. App. 1983) (noting that the military justice system is "sufficiently foreign from our own system of criminal justice and from that of our sister states and federal government so as to prohibit its use as a threshold predicate of enhanced punishment").

125. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(g) (2009).

126. See NAT'L INST. MILITARY JUSTICE & AM. BAR ASS'N, *supra* note 113, at 4.

127. A Blackwater contractor working in Iraq was making \$30,000 per month, while a private first class in the service was making \$20,000 per year. See Pan, *supra* note 69; *Basic Pay: Active Duty Soldiers*, GOARMY.COM, <http://www.goarmy.com/benefits/money/basic-pay-active-duty-soldiers.html> (last visited Sept. 29, 2010).

likelihood of successful prosecutions. Concomitantly, fundamental criminal rights for the defense such as speedy trial, grand jury indictment, and trial by jury would be preserved and strengthened.

A. Constitutional Authority for Establishment of Overseas Courts?

Congress has the power to establish such a court system pursuant to Article I, Article III, or Article IV of the U.S. Constitution.¹²⁸ The President also arguably has the power to establish tribunals under the “war and foreign relations powers” set forth in Article II.¹²⁹ However, for various reasons establishing a court system under Article II seems the least promising.

The recent history of attempts to establish courts falling under some assertion of Article II executive power includes mainly unique event-driven situations. For example, in 1979 the executive branch established the U.S. Court for Berlin to try East German hijackers in Berlin when the West German government refused to get involved for political reasons.¹³⁰ More recently, President George W. Bush’s initial attempt to set up the Guantanamo Bay military commissions for the trial of alleged terrorists was grounded in arguments of executive war powers to establish such tribunals.¹³¹ These experiences have taught that establishment of tribunals by the executive branch, typically surrounded by due process and separation of powers controversies, will undoubtedly lead to challenges to the court’s legitimacy. The hijacking case tried in Berlin was fraught with difficulties including the alleged attempts by other executive branch agencies to assert improper influence over the proceeding.¹³² And although Congress ultimately passed the Military Commissions Act of 2006 establishing the Guantanamo Bay tribunals, this occurred only after the U.S. Supreme Court rejected Bush’s attempts to establish them without explicit Congressional authority.¹³³ Since the current political climate offers no hope of such a court establishing institutional legitimacy, it seems that establishing such an Article II court would be ill-advised.

128. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 65–66 (1982).

129. *The Department of Justice and Terrorism: Hearing Before the S. Judiciary Comm.*, 107th Cong. (2001) [hereinafter *Terrorism Hearings*] (statement of John Ashcroft, Att’y Gen. of the United States).

130. See generally Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1 (1986).

131. *Terrorism Hearings*, *supra* note 129.

132. Fullerton, *supra* note 130, at 10–13.

133. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

However, creation of similar courts under Article I has much stronger historical and constitutional support. Article I courts may be established by Congress pursuant to the power set forth in Article I, Section 8 which provides as follows: "The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court"¹³⁴

Throughout the course of U.S. history Congress has established a wide array of courts under its Article I powers.¹³⁵ For example, the following are some of the courts established by Congress under Article I:

U.S. Tax Court¹³⁶

U.S. Bankruptcy Court¹³⁷

U.S. Court of Appeals for the Armed Forces¹³⁸

District of Columbia Judiciary, including the D.C. Court of Appeals¹³⁹ and the Superior Court of the District of Columbia¹⁴⁰

There are differences between establishing the proposed court under Article I versus Article III—the significance of which varies by perspective. Most obvious is the status of the judges who sit on

134. U.S. CONST. art. I, § 8.

135. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 103-04 (1982) (White, J., dissenting) (describing the types of possible Article I courts as characterized by the plurality).

First, there are territorial courts, which need not satisfy Article III constraints because the Framers intended that as to certain geographical areas . . . Congress was to exercise the general powers of government. Second, there are courts martial, which are exempt from Art. III limits because of a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue. Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights—controversies between the Government and private parties—which are not covered by Art. III because the controversy could have been resolved by the executive alone without judicial review.

Id. (internal quotation marks and citations omitted).

136. Established by Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1970).

137. Established by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

138. Established by The Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1952).

139. Established by Act of Feb. 9, 1893, ch. 74, 27 Stat. 434.

140. Established by District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

the court. Article III judges enjoy life tenure and their salaries may not be reduced by Congress during their continuance in office.¹⁴¹ By contrast, Article I court judges typically are appointed by the President and serve a fixed term of years.¹⁴² The terms are typically quite lengthy—examples being the term of a U.S. Bankruptcy Court judge which is set at 14 years¹⁴³ and the terms of U.S. Tax Court and Court of Appeals for Armed Forces judges which are set at 15 years.¹⁴⁴ The degree of insulation from the political process provided by life tenure seems to militate in favor of establishing these courts as Article III courts. However, we must acknowledge that the history of the District of Columbia courts establish precedent for non-life tenure Article I judges overseeing extensive functioning criminal courts, and there is no evidence that absence of life tenure has prevented these judges from effectively performing their duties.¹⁴⁵

The other significant difference seems to be that if the court is established under Article III, the Constitution would require that the accused be provided with the right to a jury trial.¹⁴⁶ In the cases of courts established under Article I, there is no explicit constitutional requirement for the right to be tried by a jury. However, even if Congress were to establish an overseas Article I court system, trial by jury would most likely be considered a minimum constitutional protection in light of the Court's ruling in *Reid*. Therefore, if the court must provide essentially the same due process and procedural protections under either Article I or Article III, the real question involves an assessment of the value of the stronger theoretical independence of Article III judges. Although I would argue that judicial independence and resulting institutional legitimacy are sufficiently strong enough reasons to opt in favor of Article III courts, I will concede that establishing this proposed system under Article I is also theoretically possible. This general proposition for the establishment of overseas courts is supported in the scholarly literature by such commentators as Professor Maryellen Fullerton who, more than twenty years ago, argued for the establishment of overseas Article III courts to handle hijacking

141. U.S. CONST. art. III, § 1.

142. Arthur John Keeffe & Ruth M. Wallick, *Article III: Where Are You Now That We Need You?*, 62 A.B.A. J. 240 (1976) (discussing the District of Columbia Court Reorganization and Criminal Procedure Act of 1970, which established the DC court system with Article I judges rather than Article III judges).

143. See 28 U.S.C. § 152 (2006).

144. See 26 U.S.C. § 7443 (2006); 10 U.S.C. § 942 (2006).

145. Keeffe & Wallick, *supra* note 142.

146. U.S. CONST. art. III, § 2, cl. 3.

cases.¹⁴⁷ However, most recent scholarly attention has focused on strengthening MEJA or subjecting civilians to courts-martial with little focus on the inherent limitations to either approach. Although I strongly oppose the extension of court-martial jurisdiction to civilians, I applaud MEJA's extension of extraterritorial jurisdiction. However, this is only a partial fix; true, lasting consistency and justice will not be served without a more comprehensive approach to the problems.

For the reasons stated above, the best approach is to create a court under Article III, Section 1 of the U.S. Constitution. This Section provides in relevant part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹⁴⁸

One question which comes to mind is whether Congress has the constitutional power to establish an Article III court *overseas*. Nothing in Article III appears to limit the power of Congress to establish such an overseas tribunal. Of particular note is that Section 2, Clause 3 of Article III, implicitly supports such overseas tribunals:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.¹⁴⁹

This clause specifically allows the trial to be at such place or places as the Congress may by law direct and would appear to grant Congress the authority to create a court system to address ongoing criminal activity overseas that affects American interests. The text of the Sixth Amendment to the U.S. Constitution, which grants the right to jury trial, however is somewhat ambiguous, but does not seem to prohibit the trial of persons by overseas Article III courts. This Amendment provides that

in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

147. See generally Fullerton, *supra* note 130.

148. U.S. CONST. art III, § 1.

149. *Id.* § 2, cl. 3.

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹⁵⁰

Although the Sixth Amendment makes reference to an impartial jury of the *State and district* wherein the crime shall have been committed, Section 2, Clause 3 of Article III clearly contemplates the trial of cases arising outside any particular state. Reading these two sections together, the Constitution would seem to only require trial by an impartial jury of the area under the control of the U.S. government. Without a more explicit expression of intent by the Framers to allow trials within the exclusive sovereign territory of another nation, allowing trials to be conducted within areas controlled by the U.S. government is presumptively the outer permissible limit of the exercise of such jurisdiction.

B. Implementation of the Courts: Logistics and Locations

Assuming that the concept is constitutional, implementing such a system raises many key questions, some of them institutional and some of them logistical. I propose that Congress establish four Overseas Federal Districts which conform to geographical regions where there is already a significant U.S. military and diplomatic presence. These districts would include the Overseas Federal District of Europe and the Balkans (UK, continental Europe, and the Balkans), the Overseas Federal District of Africa and the Middle East (Israel, Egypt, Jordan, Iraq, Afghanistan, Turkey and all of Africa), the Overseas Federal District for the Far East (Japan, Korea, China, Thailand, Hong Kong, Singapore, and Australia), and the Overseas Federal District for South and Central America (all countries in the Western Hemisphere from Mexico south).

Once the Overseas Federal Districts are established, Congress may authorize the President to appoint Article III judges to fill these vacancies, along with the appropriation of funds for the establishment of a support staff and courtroom facilities. Federal judges appointed to a specific district would “ride a circuit,” alternating between the various geographic locations within his or her district on a fixed schedule or on an “as-needed” basis. For example, the judge appointed to the Overseas Federal District of Africa and the Middle East could alternate between Iraq, Afghanistan, Turkey, and any other location within the district that would

150. U.S. CONST. amend. VI.

require a sitting judge. Congress would need to allocate money for the establishment of a full complement of staff for the court including pretrial services, probation officers, and defense counsel. Personnel could be hired or reassigned from these currently existing agencies to fill the vacancies that would be created. U.S. Marshals Service special agents could be detailed to provide security and prisoner management services.

C. The Problem of the Jury System in Overseas Federal Districts

One of the biggest challenges is the establishment of a viable jury system within the newly created Overseas Federal Districts. The Jury Selection and Service Act of 1968 established the qualifications for jurors in federal cases.¹⁵¹ Essentially, jurors must be U.S. citizens, have resided in the district for at least one year, meet minimum literacy requirements, and be fluent in English.¹⁵² They must also be mentally and physically capable of service and free from pending charges or convictions of crimes punishable by imprisonment for more than two years.¹⁵³ I propose the jury be drawn from civilians assigned to the bases and U.S. enclaves throughout the particular Overseas Federal District. In light of the requirement of one year of residency in the district, I would recommend that Congress amend 28 U.S.C. § 2865 to allow an exception to the one year residency requirement for cases prosecuted in the Overseas Federal District Courts. Due to the relatively high turnover of personnel in these overseas districts,¹⁵⁴ it seems more reasonable to require them to have resided in the Overseas Federal District for three months instead of one year.¹⁵⁵

One challenge that might be mounted is that selection of jurors from a limited pool would be a violation of the defendant's right to a jury drawn from a cross-section of the community. In *Taylor v. Louisiana*, the Court applied the principle that although a defendant is not entitled to a jury of any particular composition, the jury wheels, pools of names, panels, or venires from which the juries are

151. 28 U.S.C. §§ 1861–1878 (2006).

152. *Id.* § 1865.

153. *Id.*

154. See Kristen Hayes, *Halliburton Keeps Its Civilian Employees in Iraq in Contact with Home*, N. COUNTY TIMES (Apr. 19, 2004 12:00 AM), http://www.nctimes.com/business/article_54db18a1-7256-5d64-946b-638be7d20b93.html.

155. The turnover rate is exceedingly high—with most contractors staying in Iraq for one year or less. See *id.* However, there are a relatively large number of contractors who have been to Iraq on multiple occasions, which would cumulatively exceed one year.

drawn *must not systematically exclude distinctive groups in the community*.¹⁵⁶ The Court clearly emphasized this by stating:

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition¹⁵⁷

So long as the proposed court establishes a method of selecting the venire that does not systematically exclude certain classes and allows selection of jurors from the available U.S. citizens within the Overseas Federal District, this proposal seems to be within the Sixth Amendment's requirement for an impartial jury for the criminal defendant.

D. Location and the Problem of Finding Appropriate Counsel

If Congress were to authorize the establishment of an overseas court system, an important issue to be addressed would be the physical location of the court while in session. There are many options with respect to where the court might be held. U.S. military bases or compounds, the U.S. Embassies, or any suitable secure location within the country would be logical choices. In most cases it would make the most sense to have the cases heard on military bases because they usually provide both the facilities and security necessary for judicial proceedings. However, if suitable military or other U.S. government enclaves are unavailable, negotiations with the host country could produce otherwise satisfactory locations.

Proximity to U.S. bases overseas would also likely reduce costs by providing a sizable pool of qualified attorneys who could be deputized to serve as special assistant U.S. attorneys (SAUSAs) in the overseas court proceedings. For decades the DOJ has appointed military judge advocates (JAGs) to prosecute crimes committed by civilians on military installations in the United States.¹⁵⁸ The SAUSA program is popular with both the DOJ and the service JAGs. Since it reduces the workload on the DOJ's AUSAs while giving military attorneys experience in federal court, both organizations enjoy

156. 419 U.S. 522, 538 (1975).

157. *Id.*

158. See 32 C.F.R. 516.4(e) (2009) (discussing the responsibilities for JAGs who are appointed as SAUSAs).

considerable benefits. Such a deputization program should work just as well for cases prosecuted in the proposed overseas Article III courts.

Similarly, military defense counsel might be assigned as counsel for civilian accused. All military defense counsel are members of a state bar and have been certified by the services as qualified to represent accused in criminal cases.¹⁵⁹ For those civilians who cannot otherwise afford counsel, the availability of qualified military counsel could provide an immense benefit. At a minimum such military counsel could provide assistance until retained civilian counsel could arrive from the United States to represent the civilian accused. I would also suggest that in conjunction with creating the overseas Article III courts that Congress also create an organization to arrange for and help fund the costs of attorneys for civilians prosecuted in the overseas courts.

VI. POSSIBLE OBJECTIONS TO THE PROPOSED OVERSEAS ARTICLE III COURT

There are many possible criticisms of my proposal. I will address what I believe to be the most valid ones. I concede that host nations could view the establishment of such a court system within their territorial borders as an infringement on their sovereignty. In many areas where these courts would likely function, Afghanistan for example, there is no effectively functioning court system (or government for that matter), so establishment of this court system would be unlikely to generate much opposition. In other more stable countries, the compelling reasons for the establishment of such a court seem to be diminished. At any rate, I submit that the United States establish this regime through treaty negotiations with host countries. These usually arise through status of forces agreements.¹⁶⁰ There are certainly incentives for host nations in such negotiations, not the least of which are conservation of both judicial and governmental resources.

159. For the qualifications of military defense counsel, see U.S. MANUAL FOR COURTS-MARTIAL R. 502(d)(1).

160. A Status of Forces Agreement (SOFA) is an agreement between a country and a foreign nation stationing military forces within that country. These agreements generally establish the framework under which foreign military personnel operate in a foreign country, addressing how the domestic laws of the foreign jurisdiction shall be applied toward foreign personnel while in that country. See R. CHUCK MASON, CONGRESSIONAL RESEARCH SERVICE, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009).

Some may argue that we should follow the example of our recently negotiated status of forces agreement with Iraq.¹⁶¹ Until recently, U.S. forces and civilian contractors were not subject to criminal jurisdiction by Iraqi courts. Paul Bremer, the first head of the Coalition Provisional Authority, issued a memorandum establishing criminal immunity for all U.S. personnel from prosecution by Iraqi courts.¹⁶² However, the recently approved Iraq-U.S. Accord allows Iraqi courts to exercise criminal jurisdiction over U.S. service members and other U.S. citizens in certain “serious” cases.¹⁶³ In my opinion, no U.S. citizens involved in nation-building as part of the U.S. government’s mission there should be subject to Iraqi criminal jurisdiction because of the unstable and immature state of the current Iraqi criminal courts system.¹⁶⁴ The Iraqi criminal justice system is notoriously corrupt and fails to provide minimal due process. In the words of a recent Human Rights Watch report, “the court has failed to provide basic assurances of fairness, undermining the concept of a national justice system serving the rule of law.”¹⁶⁵ The same holds true for many other countries where civilian employees, dependants, and contractors of the U.S. government go.¹⁶⁶ While we should strive mightily to hold employees, dependents, and contractors of the U.S. government accountable, we should also be diligent in ensuring that they are only subjected to possible punishment in a fair, mature criminal justice system.

Another obvious criticism in the current fiscal climate is cost. There would be substantial costs associated with manning and equipping a new federal court system.¹⁶⁷ Inefficiency is another concern. Some would argue that there are not sufficient numbers of individuals who fall into the gap to make it worthwhile. It seems that this is not quite correct. In addition to the burgeoning ranks of contractors, there are dependent husbands and wives of service

161. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter Status of Forces Agreement].

162. See Coalition Provisional Auth. Order No. 17, *supra* note 3, § 4, ¶ 3.

163. See Status of Forces Agreement, *supra* note 161.

164. HUMAN RIGHTS WATCH, THE QUALITY OF JUSTICE: FAILINGS OF IRAQ’S CENTRAL CRIMINAL COURT 12–13 (2008) (discussing the reasons for the current dismal state of Afghanistan’s legal system, and describing it as “highly ineffective and dysfunctional; it does not operate as a system at all”).

165. *Id.* at 1.

166. See Ali Wardak, *Building a Post-War Justice System in Afghanistan*, 41 CRIME, L. & SOC. CHANGE 319 (2004).

167. Although cost estimates on my proposal are not currently completed, I expect to have them available by the time the Article goes to press.

members, civilian employees of other federal agencies, and DoD schools personnel to name only a few of the categories. In total, there are thousands of individuals living and working in the region encompassing the Middle East alone.

A final criticism is that accused in overseas Article III courts will not be able to obtain effective representation due to their location. While this concern is valid, as mentioned above, there are several possible remedies, including the use of military defense counsel in the area to provide representation. In addition, as part of the proposal for overseas courts, I would recommend that Congress also could create an organization to assist civilian accused in obtaining counsel and to further facilitate the logistics and travel issues that will likely arise. By providing these resources, it is likely that counsel will be sufficiently available to represent the accused in these overseas courts.

CONCLUSION

The United States has a moral responsibility to both protect and treat civilian employees and contractors of the U.S. government fairly, but there is an important responsibility to hold them accountable for criminal actions as well. This is particularly important when the United States is engaged in regime change, nation-building, and the establishment of the Rule of Law in other countries. Until the problems identified are corrected by reasonable reforms like those suggested in this Article, the United States will have difficulty making progress in many of these challenging areas.